

Stoel Rives LLP – Tax and Other Incentives for Renewables

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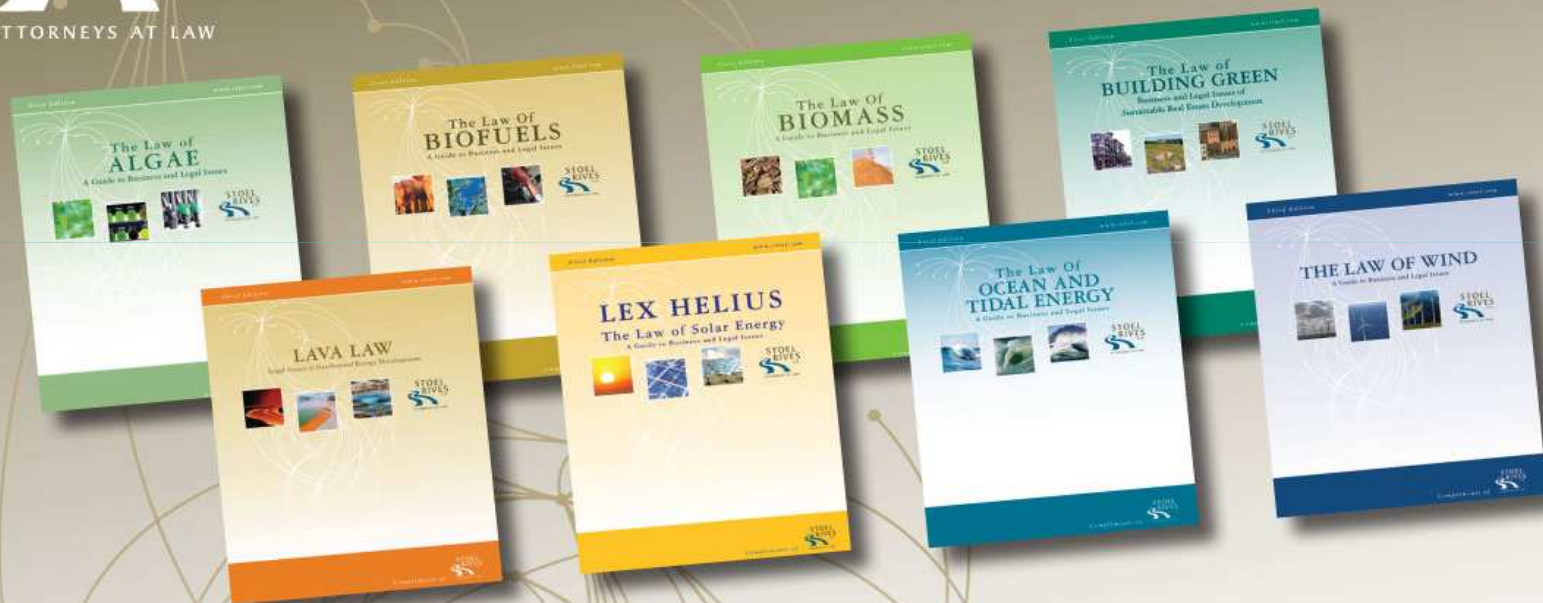
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We wrote the book on renewable energy law...



...in fact, we've written eight of them, plus a blog and a wiki:

www.lawofrenewableenergy.com

www.lawofalgae.com

Alaska California Idaho Minnesota Oregon Utah Washington

Renewable Energy Business Summit - 11/15/10

Production Tax Credit

- Based on amount of electricity produced
 - Generally 2.2¢ per kilowatt hour for 2010
- Credit period
 - Generally 10 years from “placed-in-service” date
- Qualified resources
 - Wind, Geothermal, Biomass, Marine and Hydrokinetic, Others (small irrigation, landfill gas, trash, qualified hydropower, but not solar)
- Placed in service before 2014 (2013 for wind)



Investment Tax Credit

- Based on the cost of qualifying equipment
 - Generally 30% of tax basis
 - Credit is claimed entirely in the year in which property is placed in service
- To qualify, property must be “energy property”
 - Solar
 - Geothermal
 - Combined heat and power
 - Election for PTC-eligible property

Investment Tax Credit *(cont.)*

- Facility must be placed in service by taxpayer before the applicable credit termination date:
 - January 1, 2013 for wind
 - January 1, 2017 for solar
 - January 1, 2014 for most other types of projects
- PTC-eligible property must be tangible personal property or other tangible property (not buildings or structural improvements) used as integral part of facility

Investment Tax Credit *(cont.)*

- Nonrefundable but can be carried back one year and forward 20 years
- Basis of property reduced by 50% of ITC
- Recapture if disposed of within five years of placed-in-service date
- No cutback for subsidized financing

Treasury Grant Overview

- Section 1603 - election to receive cash grant
- Eligibility requirements similar to ITC
- Project generally must be placed-in-service in 2009 or 2010, or construction must begin before 2011 and project placed in service by credit termination date
- Application due before October 1, 2011

Treasury Grant Overview *(cont.)*

- Payable within 60 days of later of completed application or placed in service date
- Generally operates in same manner as ITC
 - 30% of tax basis of qualifying property (10% for certain projects)
 - Not included in recipient's income
 - Basis reduced by 50% of grant amount
- Subject to recapture if sold to disqualified person within five years

1603 – Where We Stand Now

- 1603 goes the way of the dodo after 2010
 - Project generally must be placed in service in 2009 or 2010
 - Or construction must begin before 2011 and project must be placed in service
 - by credit termination date
 - 2012
 - 2013
 - 2016



Beginning Construction

- Treasury Guidance, including recent FAQs
- Two alternative ways to qualify:
 - “Physical work of significant nature”
 - 5% safe harbor -- costs “paid or incurred”
- Tendency to conflate two tests
 - They are very distinct



Physical Activity

- “Physical work of a significant nature”
 - Must be on specified energy property, including foundations, pads, excavation
 - Roads: only certain roads qualify
 - Does not include preliminary activities
- Minimal work required
 - Emphasis on continuity
 - “Closely scrutinize”
 - “Continuous program of construction”



Includes Work by Contractor

- On site or off site
 - No money required!
 - Binding written contract
 - Specified energy property
 - Identification by contractor
 - Not inventory
 - Need not have site indentified



5 Percent Safe Harbor

- Strictly an expenditure test
 - “Pays or incurs” 5% or more
 - Cost not “incurred” until “economic performance” occurs (provided to applicant)
 - “Provided to applicant” means passage of title, delivery or acceptance
 - 3½-month rule
 - 5% of actual (not estimated) total project costs
 - Look-thru rule for property not yet provided



5 Percent Safe Harbor (con't)

- Binding written contract rules apply
 - Services also included if related to property
- Special look-thru rule
 - Costs “paid or incurred” by supplier
 - Economic performance rules apply
 - May allocate costs
- No continuity requirement



Paperwork!

- Application required before 10/1/2011
 - May apply beforehand and Treasury promises to respond (but no deadline)
 - Physical work
 - Independent engineer's report, invoices
 - Schedule, budget, contract, contractor's report (penalties of perjury)



More Paperwork!

- 5 % Safe Harbor
 - CPA attestation
 - Amount incurred by 12/31/2010
 - Description of costs
 - Estimate of total costs
 - Invoices, etc.
 - Look-thru rule
 - Copy of contract
 - Contractor statement (penalties of perjury)



Whither 1603?

- 1603 has been a true game changer!
- So, In the greatest tradition of Washington, some are suggesting taking 1603 ... and ripping it up!



Beyond 2010 ...

- Lame duck session?
 - Cantwell-LeMieux -- The simplest solution
 - HR 4599 – Blumenauer (and Levin)
 - Inside Baseball
 - Eliminate 1603 (except for projects begun before 2011)
 - Replacement would be refundable tax credit
 - Pros and Cons:
 - Fixes problems with existing 1603 (Pro)
 - Delay in payment up to 15 months (Con)
 - Administered by the IRS ☺

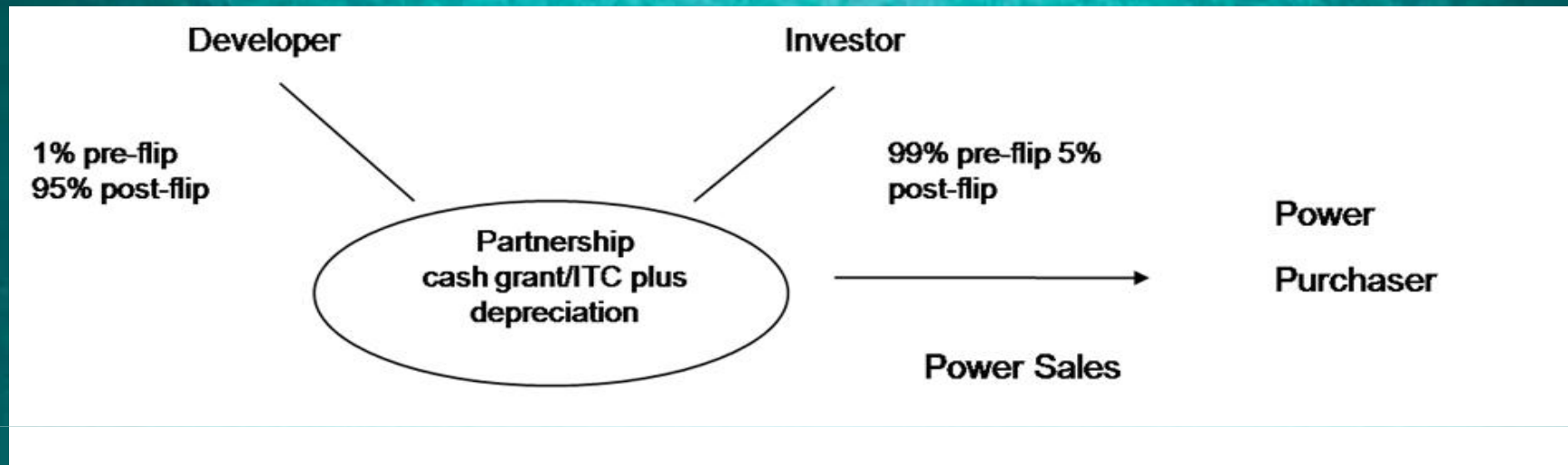


And If 1603 Sunsets?

- PTC and ITC (by election) still apply thru:
 - 2012 for wind
 - 2013 for most everything else
 - 2016 for solar, fuel cells (ITC only)
- Back to a tax equity world
 - Tax equity coming back, but slowly
 - Not fast enough to sustain the industry
 - Partnership flips and sale/leaseback structures

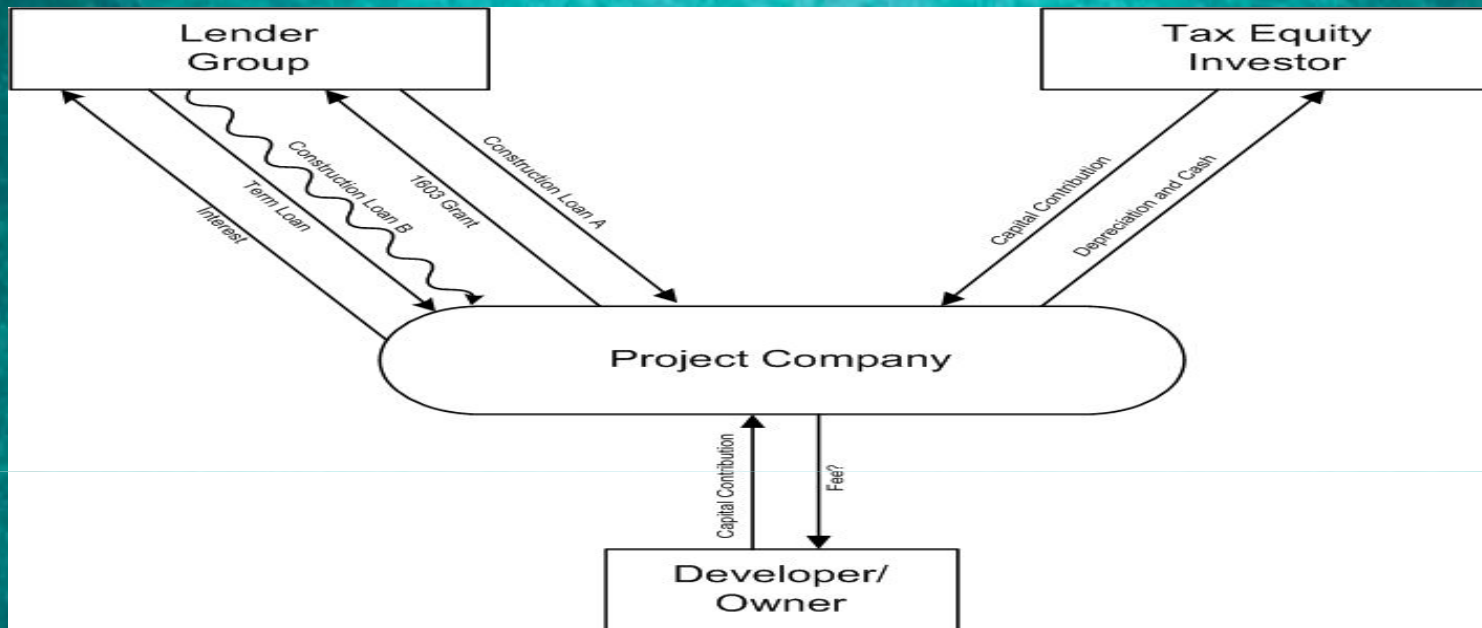


Partnership Flip



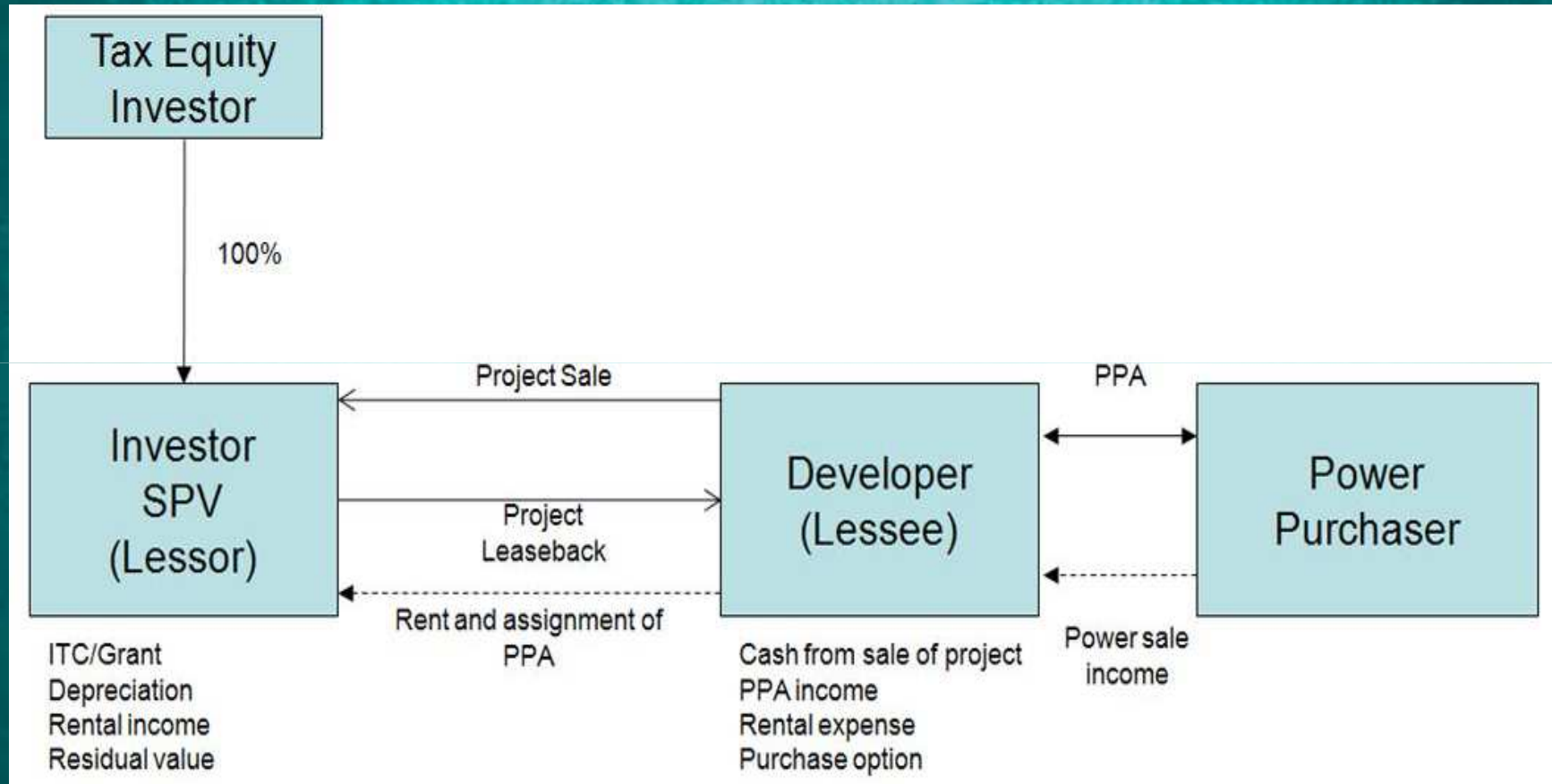
- Investor receives cash grant plus depreciation
- Flip occurs after investor receives IRR but not within first five years
- Developer generally has purchase option after flip
- Capital account or outside basis issues

1603 Credit Facility

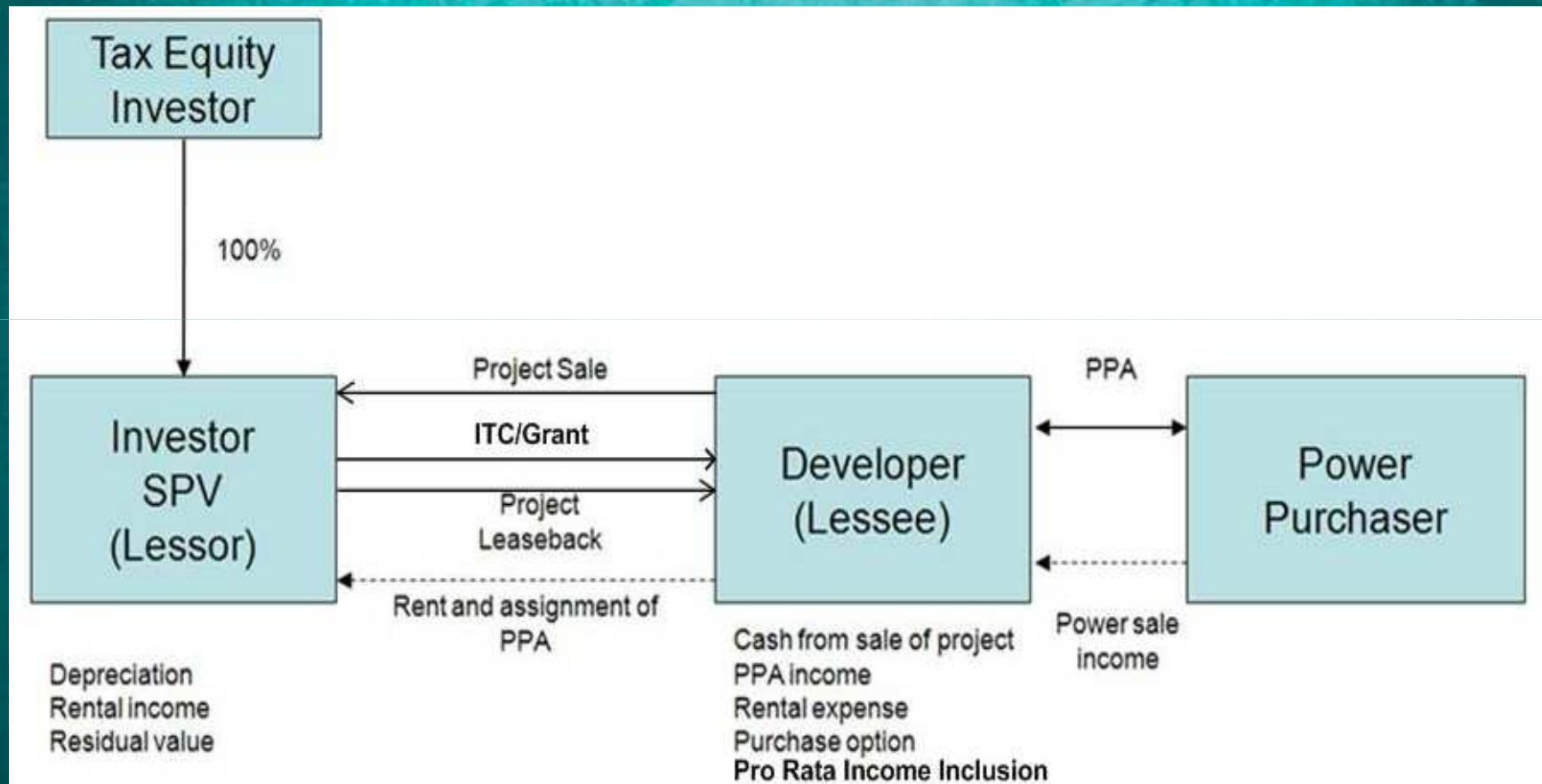


- Two tranches of construction debt
 - Tranche A secured by and taken out by 1603 grant
 - Tranche B converts to term debt
- Tax equity player for depreciation

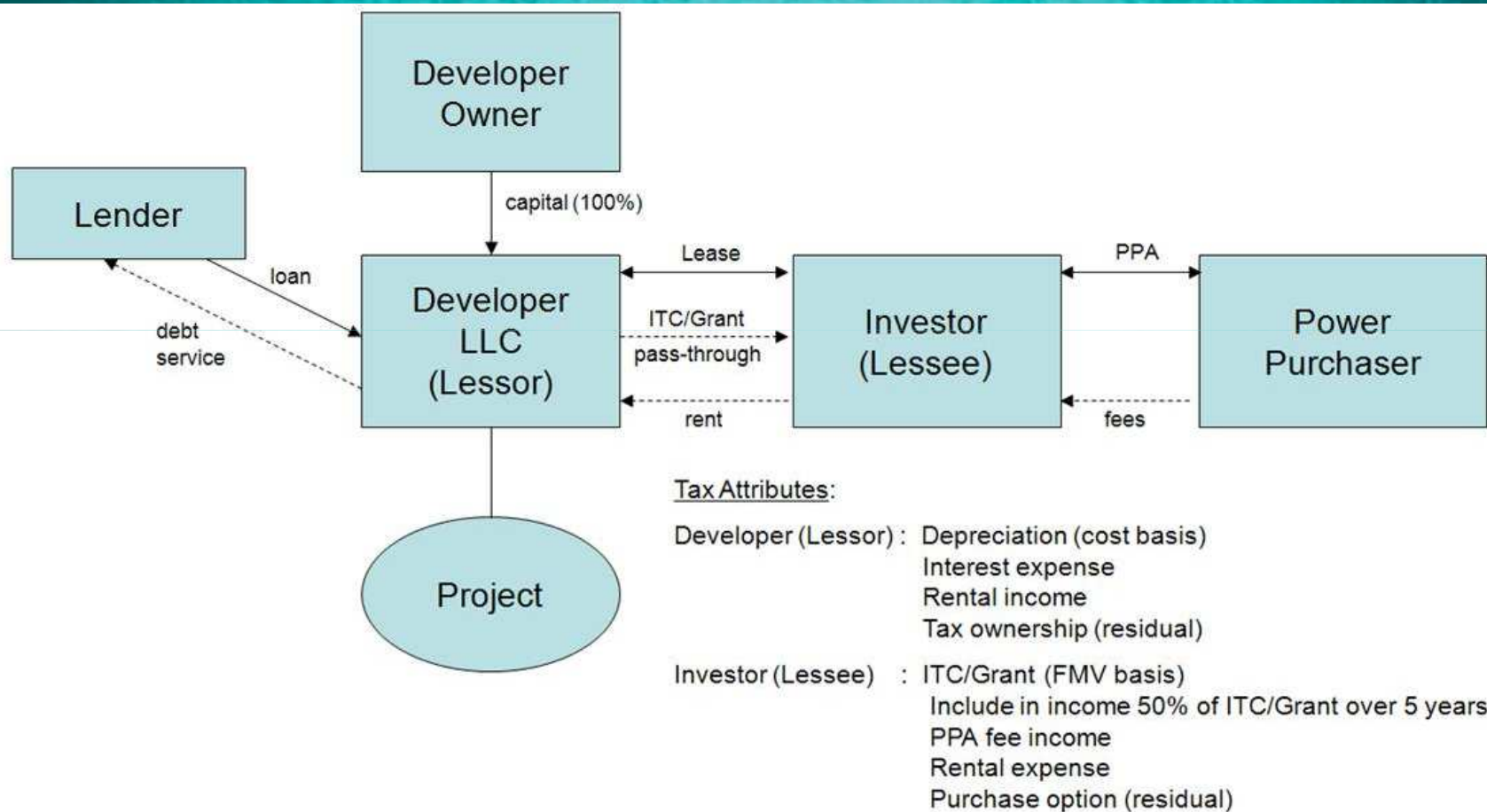
Traditional Sale - Leaseback



Sale-Leaseback with Grant Pass-thru



Inverted Lease



DOE Loan Guarantees

- Crucial Financing Mechanism or Costly Distraction?
- 12 projects issued conditional commitments
- 4 others issued but later closed
- Unless you have a big project, big bucks and a lot of time to burn ...